United States Railway Association,
Appellant,

v.

Connecticut General Insurance Corporation, et al.,
Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania.

REPLY BRIEF OF APPELLANT UNITED STATES RAILWAY ASSOCIATION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-167

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I. THE DECISION OF THE SPECIAL COURT

On September 30, 1974, the Special Court handed down its opinion on the appeals from the "180-day decisions" of the Reorganization Courts. It held that the Rail Act does provide a fair and equitable process for the reorganization of each debtor railroad. In reaching this conclusion, the Special Court considered and rejected the constitutional challenges presented in these cases.

We shall not here restate the many directly relevant conclusions of that distinguished panel. We emphasize, however, that there are two important differences between the Special Court proceedings and these cases. First, these cases, which involve challenges to the facial constitutionality of the Act, were decided below on motions for summary judgment based on a limited set of stipulations. The "180-day decisions" resulted from plenary proceedings, including live presentation of a great deal of evidence not of record in these cases. The Special Court itself emphasized that it had before it a more adequate record than the court below in these cases [1] and that the issues could not be resolved "without regard to the facts." [2] Second, while the question before the Special Court—whether the Act provides a fair and equitable process—included the constitutional issues presented in these cases, the Special Court made it clear that in its view the statutory "fairness and equity" standard is higher at critical points than the standard of bare constitutionality.[3]

II. RESTATEMENT OF THE ISSUES

Plaintiffs have challenged the constitutionality of the Rail Act on a number of grounds. One, relating to the alleged lack of an assured remedy for excessive erosion, was adopted by the court below, and another, relating to the statute's alleged lack of uniformity, was adopted in

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[1] *In the Matter of Penn Central Transportation Company, Debtor, et al.* (Nos. 74-6 through 74-12), Special Court, Regional Rail Reorganization Act of 1973 (Slip Opinion, September 30, 1974) ("*Special Court 180-Day Appeals*") at 33.

[2] *Id.* at 38.

[3] *Id.* at 39. We do not necessarily agree that in the circumstances of these cases the term "fair and equitable" imposes a higher standard than do the constitutional provisions invoked by Plaintiffs. The important point is that the Special Court held that the higher standard was satisfied.

minor part. The other grounds of attack were rejected as premature but have been renewed before this Court in further support of the decision under appeal.

All of these challenges, including those held premature below, have now been decisively rejected by the Special Court. We submit that this Court also should reject them and should reverse the decision below.

The question underlying all of these challenges is the future of the Penn Central. The Plaintiff investors contend that Penn Central is their railroad and Congress must choose between letting them dismantle it and directing a Government agency to buy the railroad for cash (at a price they say must be substantially higher than net liquidation value). The Special Court answered that contention decisively: "Congress did not have to choose between the Scylla of outright condemnation and subsequent nationalization and the Charybdis of a collapse of rail transportation in the most heavily industralized section of the country." [4] If a self-sustaining Conrail can be created out of portions of the railroads now in reorganization, the Penn Central estate can be required to await Conrail's creation and to accept Conrail securities as part of the consideration for the rail properties it transfers pursuant to the Act, as long as it is assured of receiving the "constitutional minimum" as determined by a federal court.

Plaintiffs advance four main arguments for striking down the Rail Act and forcing Congress, instead, to condemn and nationalize the Penn Central system. Each of these contentions is without merit.

A. First, Plaintiffs contend that Conrail will not in fact be a "self-sustaining rail service system" as re-

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[4] *Id.* at 59.

quired by the Rail Act, so the whole enterprise is futile. Having chosen to proceed by way of motion for summary judgment without any supporting financial analysis of Conrail's prospects, Plaintiffs rest this key contention on the naked assertion that, on the face of the Act, Conrail can be no more than a warmed-over Penn Central.[5]

This invitation to reject the Final System Plan as unworkable before it has been written should be declined. Congress has determined that with new legal and regulatory tools which create the capacity to redesign and reduce the system, together with the more than $2 billion in financial resources provided in the Rail Act, USRA can create a self-sustaining private rail system. The Penn Central Trustees have agreed that the basic concept of the Rail Act is "sound".[6] And, in the most careful judicial examination yet made of the prospects of Conrail's viability, based on a factual record not before this Court, the Special Court found "a sufficient possibility of the viability of Conrail that it is not unfair and inequitable to require [the investors] to await the processes of the Rail Reorganization Act if a remedy under the Tucker Act [for any shortfall of the consideration below the "constitutional minimum"] is ultimately available."[7] While the merits of that factual conclusion are not before this Court, the finding leaves no room whatsoever for Plaintiffs' contention that, as a matter of law, Conrail can be found non-viable now on the face of the statute alone.

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[5] Brief of Appellees Connecticut General Insurance Corp., *et al.*, in Nos. 74-165, 74-167, 74-168 ("Brief of Appellees Conn. Gen.") at 53-54. At the same time, Plaintiffs make the different and incompatible argument that Conrail is a new and untested concept in railroading. *Id.* at 55-56.

[6] Penn Central Trustees' April 1974 Report, J. Doc. 10 at 4.

[7] *Special Court 180-Day Appeals* at 83.

B. Plaintiffs next contend that reorganization of a railroad must be a "voluntary" process, and that the Rail Act is unconstitutional because they have chosen not to accept it. They argue that even if Conrail is viable, and even if the Rail Act assures the Penn Central estate that it will receive value equal to the "constitutional minimum" in Conrail securities, Government-guaranteed securities, and other consideration, they do not have to accept that consideration if they would prefer to do something else with the railroad—either dismantle it or force its nationalization. These contentions are refuted by the entire history of Section 77, which

> "reflects a public policy that the operation of railroads as sound, economic units should be achieved for the benefit of the public, regardless of the interests of creditors and stockholders." [8]

As the Special Court concluded, many decisions of this Court leave

> "no doubt that a bankruptcy court can constitutionally be vested with power to resort to its informed judgment in determining what constitutes satisfaction of the claims of creditors." [9]

C. Plaintiffs next contend that even if the end result, reorganization into Conrail, were constitutional, Congress cannot "get there from here." On the one hand, they claim that too much erosion of pre-bankruptcy claims will occur even during the very short period of time Congress has provided for a Final System Plan to be adopted and for Conrail to begin operations. On the other hand, they claim that this period must be substantially lengthened to allow judicial review of the valuation of the rail properties and the consideration *before*, rather

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[8] 5 Collier on Bankruptcy ¶ 77.02, at 469 (14th ed. rev. J. Moore 1974).

[9] *Special Court 180-Day Appeals* at 106.

than after, the properties are transferred and Conrail starts to function. The court below apparently accepted some part of these contentions, even though it did not define or quantify any such erosion or determine whether it exceeded constitutional limits. That court's ruling cannot be squared with the well-established principle, also apparently accepted by the court below, that a reasonable burden may be imposed on creditors and shareholders through interim erosion in order to provide an opportunity to reorganize.

On the basis of "more ample factual records" than the court below had,[10] the Special Court conducted a complete and penetrating analysis of the likelihood of erosion of the Penn Central estate. As that analysis cogently demonstrated, "the erosion likely during the interim period has been considerably exaggerated." [11] Even if the Act had not been passed, the chances that Penn Central would have been able to accomplish large-scale abandonments during the period the Act provides for development of a Final System Plan [12] "would have been exceedingly poor." [13]

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[10] *Special Court 180-Day Appeals* at 33.

[11] *Id.* at 56. See also *id.* at 107-08 n. 112.

[12] On the assumption that Congress does not disapprove the Final System Plan first submitted and that all other steps under the Act take the maximum time allowed, 620 days would pass between enactment of the Rail Act and transfer of rail properties to Conrail in mid-August 1975. As noted in Brief of Appellee and Cross-Appellee United States Railway Association in Nos. 74-165 and 74-166 ("Brief of Appellee USRA") at 3-4 n. 1, USRA has asked Congress to enact a 120-day extension of the statutory deadlines relating to the Final System Plan, and that request is now pending. The Special Court suggested that erosion might become a more serious question if there were substantial doubts that USRA will be able to meet its prescribed schedule or that Congress will accept the first Final System Plan, but it also ruled that the Tucker Act remedy would save the Act's constitutionality in that event. *Special Court 180-Day Appeals* at 56-57.

[13] *Special Court 180-Day Appeals* at 49.

D. Finally, Plaintiffs contend that *if* the resources explicitly provided by the Rail Act are not sufficient to provide the statutorily required "constitutional minimum" consideration for Penn Central's properties and for any constitutionally compensable erosion, the Rail Act impliedly bars a further remedy under the Tucker Act and the result will be a taking of Penn Central's property for public use for less than just compensation. But, as the Special Court found, the Act cannot fairly be read to deny a Tucker Act remedy in such circumstances. Accordingly, Plaintiffs' proper remedy is not a summary injunction in advance to protect against the admittedly hypothetical possibility of such a taking, but a Tucker Act suit for just compensation in the Court of Claims if and when facts are established that entitle them to maintain such a suit.[14]

III. PLAINTIFFS' ARGUMENTS CONCERNING THE TUCKER ACT ARE WITHOUT MERIT

Plaintiffs argue that the Rail Act, on its face, will or may cause a taking of their property for public use without just compensation. The Government parties urge, first, that Plaintiffs have not established and cannot establish now that such a taking will occur and, second, that in any event the Tucker Act, 28 U.S.C. § 1491, provides an adequate remedy at law whose availability precludes advance injunctive relief. Plaintiffs' responses have now been rejected by the Special Court and are without merit.

The Special Court has rejected the argument that Congress intended in the Rail Act to repeal or limit the Tucker Act so as to deny a remedy to rail estates for actions taken pursuant to the Rail Act. The Special Court found

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[14] See *id.* at 83-108.

> "no evidence in the text or scheme of the Act that if Congress had recognized possible constitutional inadequacy of compensation, it would have preferred that the Act be struck down, with consequent serious disarray, rather than that additional monies be expended to rectify the inadequacy." [15]

The New Haven Trustee has explicitly conceded that "[t]he RRRA is silent as to any intent of Congress partially to repeal 28 U.S.C. § 1491 in cases arising under the RRRA." [16] The *amici* Congressmen agree explicitly that the Rail Act neither repealed the Tucker Act nor "engrafted" it onto the Rail Act.[17]

The New Haven Trustee's basic objection to the Tucker Act remedy is that the "Penn Central Trustees have *no* substantive cause of action, under the Tucker Act, for a taking for which they can invoke the jurisdiction of the Court of Claims . . . ." [18] We find this argument hard to understand. The New Haven Trustee has argued here and below that the Rail Act will necessarily and unavoidably cause a taking of Penn Central's property for public use without just compensation. We believe that contention to be wrong, but it certainly states a cause of action for compensation from the United States under the Fifth Amendment.

What the New Haven Trustee appears to mean is that, even though the Tucker Act by its terms gives the Court

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[15] *Special Court 180-Day Appeals* at 88.

[16] Brief of New Haven Trustee, Appellee, in Nos. 74-165, 74-167, 74-168 ("Brief of Appellee New Haven Trustee") at 26. He says, further, "The New Haven Trustee has not asserted at any time that the jurisdiction of the Court of Claims under 28 U.S.C. § 1491 was impliedly repealed by the RRRA." *Id.* at 41.

[17] Brief Amicus Curiae of Certain United States Representatives at 17-22.

[18] Brief of Appellee New Haven Trustee at 41 (emphasis in original).

of Claims jurisdiction over "any claim against the United States founded . . . upon the Constitution," [19] that jurisdiction may in fact be invoked only if Congress intended a compensated taking. He argues that no Tucker Act remedy is available here because "the RRRA was not intended as an eminent domain statute." [20] The Special Court rejected this argument,[21] which is belied by the very case the New Haven Trustee cites, as well as by established legal principles and common sense. The real point of the long passage quoted by the New Haven Trustee from *Eastport Steamship* [22] is contained in the second-to-last sentence he quotes: [23]

> "Under Section 1491 what one must always ask is whether the *constitutional clause* or the legislation which the claimant cites can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." 372 F.2d at 1009 (emphasis added).

The Fifth Amendment certainly "mandates" compensation by the Federal Government for a taking of private property for public use.[24] It is well established and logical

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[19] 28 U.S.C. § 1491.

[20] Brief of Appellee New Haven Trustee at 40.

[21] *Special Court 180-Day Appeals* at 85.

[22] *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002 (Ct. Cl. 1967).

[23] Brief of Appellee New Haven Trustee at 40.

[24] Of course, as the *amici* Congressmen suggest, the Tucker Act does not "insure the constitutionality of [all] potential unconstitutional laws." Brief at 18, quoted *passim* by Plaintiffs. For example, abridgements of First Amendment rights will rarely, if ever, be compensable in money. Similarly, the Tucker Act is not an answer to Plaintiffs' "uniformity" argument, which is adequately disposed of on other grounds. The Tucker Act does, however, insulate otherwise authorized federal action from being *enjoined* on the ground that the action will or may cause a taking without just compensation. In that event, the proper remedy is a suit for compensation under the Tucker Act, as *Hurley* v. *Kincaid*, 285 U.S. 95 (1932), makes clear.

that a person may sue in the Court of Claims on the governmental promise contained in the Fifth Amendment itself, even where it is clear that Congress intended neither to take nor to pay. *United States* v. *Causby*, 328 U.S. 256 (1946). The Court of Claims therefore specifically considered and rejected on its merits the argument that a taking was involved in *Eastport Steamship*.[25]

Plaintiffs also invoke *Hooe* v. *United States*, 218 U.S. 322 (1910) and *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), but the Special Court held that the argument based on these cases "is without force." *Special Court 180-Day Appeals* at 102 n. 106. *Hooe* involved the occupation of a building by a federal officer who had no authority to rent the building. The holding was simply that the wholly unauthorized actions of that officer did not render the United States liable for rent. In *Youngstown*, this Court expressed doubt, on the basis of *Hooe*, that a Tucker Act remedy would be available for the President's seizure of steel mills because the issue on the merits in that case was whether the President's actions had been authorized by Congress.[26]

Plaintiffs next suggest that no court other than the Court of Claims has jurisdiction to make an initial determination of the jurisdiction of the Court of Claims.[27] Defendants placed in issue below the assertion that Plaintiffs are not entitled to equitable relief because, among other reasons, a suit in the Court of Claims is an adequate remedy at law. Once the court below reached the merits of that contention, it had to decide it,

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[25] 372 F.2d at 1011. The Court of Claims ruled on the merits that a federal agency's alleged abuse of regulatory authority by refusing permission to sell a ship did not constitute a taking of property. *Id.*

[26] *Tempel* v. *United States*, 248 U.S. 121 (1918) also lacks relevance here. The holding in that case was that a mere trespass ("sounding in tort") was not a compensable taking of property.

[27] Brief of Appellee New Haven Trustee at 33-37.

as the Supreme Court ruled that the district court should have decided the adequate-legal-remedy defense in *Hurley* v. *Kincaid*, 285 U.S. 95 (1932).[28] The decision of the court below rejecting that defense is now before this Court. As the Special Court observed, a decision by this Court on the merits of the Tucker Act issue would resolve one of the essential issues squarely framed by the pleadings in these cases. "[T]he Court of Claims will abide by [this Court's] ruling, and it is immaterial whether such observance would be a matter of collateral estoppel or respect for a binding precedent."[29]

The New Haven Trustee's attempt to distinguish *Hurley* on the ground that it "did not arise in a context where Congress had specifically provided for *another court* to render judgment as to the value of the property being taken and the value of the consideration provided under the law as compensation therefor"[30] is without merit. *Hurley* arose because the government officials declined to proceed by condemnation in the district court—certainly "another court"—as required by the flood-control statute involved in that case. This Court reversed an injunction that would have required the officials either to follow the statutory condemnation procedure or to cease work, and held that the landowner should have been left to his remedy at law in the Court of Claims even though that remedy was not contemplated by the flood-control statute.

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[28] See also *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697 n. 18 (1949); *Malone* v. *Bowdoin*, 369 U.S. 643, 647 n. 8 (1962); *Richfield Oil Corp.* v. *United States*, 207 F.2d 864, 871 (9th Cir. 1953); *American President Lines* v. *Federal Maritime Board*, 133 F. Supp. 100 (D.D.C. 1955), aff'd, 235 F.2d 18 (D.C. Cir. 1956); *Western* v. *McGehee*, 202 F. Supp. 287 (D. Md. 1962).

[29] *Special Court 180-Day Appeals* at 115.

[30] Brief of Appellee New Haven Trustee at 26 (emphasis in original).

Plaintiffs' contention that the Rail Act bars a Tucker Act remedy ultimately rests, as did the decision of the court below, on the erroneous legal premise that the Rail Act itself must show a Congressional intent to renew or revalidate the century-old jurisdiction of the Court of Claims. But, as the Special Court said on this very point, "[p]utting the wrong questions is not likely to beget right answers even in law." [31] As the Special Court went on to state, "the true issue is whether there is sufficient proof that Congress intended [in the Rail Act] to *prevent* such recourse," [32] a question that the Special Court throughly and persuasively answered in the negative. The Special Court found no such intention in the words of the statute, and it noted that no case had been cited "in which a court has resorted to statements on the floor of Congress in order to consign an [act] to futility or destruction." And the Special Court found authoritative precedent against inferring that Congress would have meant to bar an adequate remedy for any taking that Congress itself directed. *Lynch* v. *United States*, 292 U.S. 571, 586 (1934).

balance needed to provide just compensation. Plaintiff Mitchell initially accepted the full presidential award but later sued in the Court of Claims for additional compensation. This Court held that the later suit was *not* barred by his earlier acceptance of the award and failure to follow the statutory procedure.

On the merits, Mitchell claimed that he was entitled to compensation not only for the value of his land but also for the loss of his corn-growing business. This Court held that although the "special value of land due to its adaptability for use in a particular business is an element which the owner of land is entitled, under the Fifth Amendment, to have considered in determining the amount to be paid as just compensation . . .." *id.* at 344-[illegible] the Fifth Amendment does not [illegible] require compensation for purely "consequential" harm through loss of business when only the land is taken. On the assumption that there was no Fifth Amendment right to recover for the loss of the business as such, the Court considered and rejected, in the para-[illegible] quoted by the New Haven Trustee, the

recognized the difficulties inherent in any judicial valuation, but it held that valuation is a function traditionally assigned to courts and that it is not unfair or inequitable to vest this responsibility in the Special Court and, if necessary, in the Court of Claims.[35] While it is obvious that the valuation process will be long,[36] the "adequacy" of a legal remedy depends on the alternatives. The only alternatives Plaintiffs have suggested to proceeding under the Rail Act are (1) to leave the creditors alone to dismantle the Penn Central, with highly uncertain results to themselves and highly certain [illegible] (2) to have the United States purchase the entire railroad (or the part it wants to keep in operation) at values apparently to be determined in judicial proceedings. The practical valu[illegible]

of Claims judgment.[37] Plaintiffs seek to engender fears on that score by suggesting that the judgment might be "astronomical." [38] With respect to the Penn Central, however, the Special Court concluded that the investors' erosion claims were "considerably exaggerated." [39] It found that the chances of abandoning substantial amounts of rail lines within the planning period established by the Act would, even in the absence of the Act, "have been exceedingly poor." [40] It concluded that, "[b]arring an economic catastrophe, there is thus little likelihood [illegible] during 1975 Penn Central will experience any of [illegible] items of erosion we have recognized." [41] The Special Court also squarely ruled that Congress may compel the claimants to accept "Conrail securities, USRA obligations and other benefits up to their full value and need [illegible] on eminent domain, with concomitant cash payments only for any shortfall." [42] Consequently, in discounting the likelihood of any actual money judgment against the United States in the Court of Claims, the Special Court noted that "these amounts may be non-

impugn the good faith of Congress in sug-
Congress might "allow the processes of the

ppellee New Haven Trustee at 72-75; Brief of Ap-
n. at 98-101.

rt 180-Day Appeals at 111-12 n. 118.

See also *id.* at 107-08 n. 112.

See also *id.* at 92 n. 98.

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2 n. 98. Earlier, without actually deciding the issue, Court had suggested that the rail estates might not entitled to receive even as much as liquidation value, oncern value of Conrail (plus the USRA obligations efits) is found to be substantial although below liqui-
d. at 61-62 n. 61.

Act to go forward after a ruling that a remedy under the Tucker Act applies . . . [and] thereafter fail to respond." [44] On the contrary, "there seems to be no sound reason why the Court of Claims may not rely on the good faith of the United States." [45] Nothing in the history of the Rail Act or the post-enactment statements of its sponsors suggests that Congress intends such defiance.

Finally, this Court should not, as Plaintiffs and the Penn Central Trustees suggest, attempt to define and limit the issues that the Court of Claims might eventually have to consider. The range of the issues open to the Court of Claims will depend on what is decided by the Special Court and on appeal by this Court in the valuation proceedings under Section 303. Moreover, the Penn Central Trustees, who request this Court to narrow the issues, have no right or need to have this Court, at this time, rule out defenses that may appear to the Court of Claims (and to this Court on review of the Court of Claims) to be just. In particular, the Penn Central Trustees have no right to insist that the United States now waive diligence on their part in pursuing and preserving their claims. As *Hurley, supra,* makes clear, all the rail estates need or are entitled to at this time is assurance that there is a federal court with jurisdiction to provide an adequate remedy for any constitutional injury they can prove. When the potential injury is an inadequately compensated taking, the Tucker Act provides that assurance.

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[44] *Id.* at 111-12 n. 118.

[45] *Glidden Co.* v. *Zdanok,* 370 U.S. 530, 571 (1962), quoted in *Special Court 180-Day Appeals* at 111-12 n. 118.

IV. PLAINTIFFS HAVE PROVIDED NO BASIS FOR AN INJUNCTION TO PREVENT EROSION BEYOND CONSTITUTIONAL LIMITS

Plaintiffs argue that even if a Tucker Act remedy is available, the likelihood that the Rail Act will cause erosion beyond constitutional limits is so strong that it is unconstitutional to require them to suffer this erosion and take their chances on a Court of Claims remedy after Rail Act proceedings have run their course. Even if this were a sound legal theory for seeking an injunction, the argument fails for lack of proof of its essential premise.

If a substantial prospect of successful reorganization exists, a rail estate may be required to suffer uncompensated erosion for the period reasonably necessary to accomplish the reorganization. Congress has provided in the Rail Act a means of saving essential Penn Central rail operations, and Plaintiffs have offered no justification for disregarding the prospect that the Act will succeed in that objective. Therefore, Plaintiffs would be entitled to injunctive relief only if they could show a likelihood that erosion will occur pending the implementation of the Act *and* that it will exceed constitutional limits before the transfers occur under the Final System Plan. They have made neither showing. The remarkable thing about these cases is that the court below granted an injunction based on the *possibility* of unconstitutional erosion even though it did not find that Plaintiffs had made either of the showings necessary to support its order.

A. Plaintiffs Offer No Justification for Assuming that Conrail Will Fail.

This Court has established two constitutional principles that frame the erosion issues in this case. *Brooks-*

Scanlon[46] and related cases hold that the owners of a railroad are entitled to cease operations and liquidate if the road is unprofitable and has no prospect of being made profitable. By contrast, *Rock Island*[47] and subsequent cases under Section 77 make it clear that investors can be required to continue to devote their property to public rail use if the railroad can be restored to profitability through reorganization. In the reorganization, pre-bankruptcy claims may be postponed or eliminated to the extent necessary to achieve profitability; and the investors may be required to sustain an economic burden from interim operations for a period reasonably consumed by the reorganization process.

Plaintiffs contend that under *Brooks-Scanlon* the Penn Central estate cannot be required to continue operations. They argue that Penn Central has no prospect of successful reorganization, either in whole or in part, with or without the assistance of the Rail Act. Therefore, they contend, no additional uncompensated erosion may be required. Since Plaintiffs have sought summary judgment on a record devoid of evidence bearing on Conrail's viability, this argument requires them to show that Conrail's doom is plain on the face of the Rail Act. They have furnished no grounds for such a conclusion.

Plaintiffs suggest that the burden rested on the Government parties (even on Plaintiffs' motion for summary judgment) to prove that Conrail will be viable, and that those parties failed to carry the burden in the court below.[48] To the contrary, it is commonplace that persons

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[46] *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396 (1920).

[47] *Continental Bank* v. *Chicago, Rock Island & P. Ry.*, 294 U.S. 648 (1935).

[48] Brief of Appellees Conn. Gen. at 53; Brief for Appellee Penn Central Company in Nos. 74-165, 74-167, 74-168, at 16-17 n. 6 ("Brief for Appellee Penn Central Co."); see Brief of Appellee New Haven Trustee at 110.

challenging a congressional enactment on the ground that it violates their constitutional rights bear the burden of establishing that such a violation will or is likely to occur. In the railroad reorganization context, the courts have ruled that the burden of proving that interim operations would result in an unconstitutional taking of property rests on the opponents of continued service. *New Haven Inclusion Cases*, 399 U.S. 392, 492-93 (1970); *In re Boston & Maine Corp.*, 484 F.2d 369, 372-75 (1st Cir. 1973).

Plaintiffs' contention that Conrail cannot be viable is a direct attack on the legislature's judgment that the Rail Act offers a feasible solution to the Northeastern rail crisis. It is beyond dispute that the courts must defer to the judgment of the legislature on the appropriateness of legislation and on the likelihood that it will accomplish its purposes.[49]

Contrary to Plaintiffs' suggestion,[50] the court below did not accept Plaintiffs' invitation to second-guess the legislative judgment that a viable Conrail can be created. The majority held that all issues relating to the ultimate transfer of property were premature. Its injunction to prevent an "erosion taking" was based on the erroneous legal views that the Special Court may not consider pre-transfer erosion in determining the "constitutional minimum" consideration and that a Tucker Act remedy for such erosion is barred—views which the Special Court

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[49] See, *e.g.*, *Oklahoma* v. *Guy F. Atkinson Co.*, 313 U.S. 508, 527, 533 (1941) (court deferred to Congress' judgment that proposed dam would relieve flooding and to Congress' choice of design); *Eisen* v. *Eastman*, 421 F.2d 560, 567 (2d Cir. 1969) (court deferred to legislative judgment that rent control law would relieve, rather than prolong, housing shortage); *General Telephone Co.* v. *United States*, 449 F.2d 846, 858-59 (5th Cir. 1971) (court deferred to FCC determination that CATV rules would enhance competition in cable TV market).

[50] See Brief of Appellees Conn. Gen. at 61; *cf. id.* at 28, 53; Brief for Appellee Penn Central Co. at 25-27, 29-30.

itself has since rejected.[51] The court below made no finding that Conrail will not or might not be viable. Judge Fullam, who concurred below and rendered the Penn Central 180-Decision since reversed by the Special Court, expressly held that "it would be both premature and inappropriate for this Court to express a judgment as to Conrail's prospects for viability."[52] Nor have the Penn Central Trustees, as some Plaintiffs assert, ever said "that the hope of reorganization afforded by the Act upon its own terms is ephemeral."[53] From the outset, the Trustees have taken the position that "[t]he basic concept of the Act is . . . sound"[54] and have agreed with the Government parties that the Act should be given a chance to work as long as a Tucker Act remedy is available.

The Special Court, in rejecting the "erosion taking" argument, did analyze Conrail's prospects for viability and concluded that those prospects are sufficiently good that, as long as a Tucker Act remedy is ultimately available, it is fair to require the investors to await Conrail's creation.[55] While we support that court's factual conclusions, we submit that this Court, lacking the factual record before the Special Court and not sitting in review of its decision, should not duplicate the Special Court's examination of Conrail's future. The Special Court acknowledged that it might be appropriate to defer to Congress' judgment that the Rail Act can succeed, "in the absence of contrary evidence."[56] It undertook a

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[51] *Special Court 180-Day Appeals* at 56, 83-102.

[52] *Penn Central* 180-Day Decision at 9, JA 124 at 133.

[53] Brief of Appellees Conn. Gen. at 80.

[54] Penn Central Trustees' April 1974 Report, J. Doc. 10 at 4.

[55] *Special Court 180-Day Appeals* at 70-83.

[56] *Id.* at 71. The Special Court said that, absent contrary evidence, the reorganization courts and the Special Court "perhaps

factual analysis of Conrail's prospects only because the opponents of reorganization had submitted affidavit evidence critical of those prospects. There is no such evidence in the record of these cases; by moving for summary judgment without any evidence at all on Conrail's viability, Plaintiffs sought a ruling on the facial constitutionality of the Rail Act. Obviously, nothing on the face of the Act indicates that USRA's planning process, aided by over $2 billion in federal assistance, will fail to produce a viable Conrail.

Plaintiffs' argument of last resort is that Conrail must have little chance of succeeding, because most of Penn Central's investors are resisting reorganization under the Rail Act.[57] That self-fulfilling prediction is irrelevant as well as misleading. As everyone involved has recognized at one time or another, wholesale liquidation of Penn Central is not a realistic option. By opposing reorganization under the Rail Act, Plaintiffs are not really seeking to be left alone to dismantle the railroad in the belief that it is worth more dead than alive. Rather, they seek to prevent reorganization under the Act in the hope that the Government will then be forced to nationalize the rail properties, at a price to the Government much greater than if a reorganization can be successfully ac-

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could rely on . . . a presumption" that Conrail will be viable. *Id.* at 71. Supporting this presumption are the great care that Congress devoted and the substantial public resources that Congress provided in designing a solution to problems revealed in the Penn Central reorganization (see Brief of Appellant United States Railway Association in No. 74-167, at 23-39), the "exceedingly heavy" practical compulsion on USRA to design a financially viable system (*Special Court 180-Day Appeals* at 71), and the fact that "[a] prime objective of the Act is to produce operating economies by eliminating unprofitable and duplicating mileage . . . ." *Id.* at 79.

[57] See Brief of Appellees Conn. Gen. at 80-81; Brief of Appellee New Haven Trustee at 87-89; *cf.* Brief for Appellee Penn Central Co. at 28.

complished.[58] Accordingly, the preferences of Penn Central's investors have little bearing on whether a viable Conrail is reasonably possible.

B. Plaintiffs Have Not Shown That They Are Suffering Any Erosion Injury.

We have contended that it is impossible to tell on the record in these cases whether any creditor or the shareholder will be worse off after the Rail Act is implemented than it would be if Penn Central took any presently available alternative course of action. Plaintiffs offer no support for a contrary conclusion.

The court below made no finding of the amount of erosion and did not say that it has or will exceed constitutional limits. Plaintiffs suggest that the lower court was inexact in its discussion of erosion, and that its findings merely lack "mathematical precision." [59] To the contrary, the court made no findings at all. After reciting the stipulated income-statement loss figures for past periods and concluding that the erosion issue is ripe, the court went on to grant injunctive relief based on the mere possibility that erosion beyond constitutional limits might ultimately be found to have occurred.[60] In contrast, on the basis of a "more ample factual record" than the court below had,[61] the Special Court concluded that for Penn Central in particular "the erosion likely during the interim period has been considerably exaggerated," [62] that there is "little

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[58] The New Haven Trustee is explicit in recommending that Conrail stock be purchased by USRA with Government-guaranteed obligations and the resulting cash be used to purchase Penn Central rail properties in eminent domain proceedings. Brief of Cross-Appellant New Haven Trustee in No. 74-166, at 89-90.

[59] See Brief of Appellee New Haven Trustee at 12-15, 78, 117. See also Brief for Appellee Penn Central Co. at 15.

[60] JA 9 at 36-40.

[61] *Special Court 180-Day Appeals* at 33.

[62] *Id.* at 56; see also *id.* at 107-08 n. 112.

likelihood" that Penn Central will suffer erosion during 1975,[63] and that even if the Rail Act had not been passed the chances that Penn Central would nevertheless have been able to accomplish large-scale abandonments by mid-August 1975 "would have been exceedingly poor."[64]

Plaintiffs fail to justify their position that appreciation in asset values should be ignored in determining whether the position of the Penn Central estate is improving or deteriorating. They suggest that increases in asset values should be disregarded because they are "caused by an inflationary economy."[65] However, the ability of the estate to satisfy claimants will be determined by matching the value of its assets, in dollars, against the dollar amounts of pre- and post-bankruptcy claims against it. That ability will inevitably be affected by the fact that Penn Central owns physical properties whose real value may be increasing substantially.[66] Plaintiffs suggest that the ruling to that effect in *In re Boston & Maine Corp.*, 484 F.2d 369, 373 n. 5 (1st Cir. 1973) is distinguishable because "[t]he point there at issue was one of standing"[67] to challenge continued operations pending reorganization. The issue in *Boston & Maine* was no more one of "standing" than the issue in these cases. In both cases, the question is whether parties who would concededly have standing if they could show any

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[63] *Id.* at 53.

[64] *Id.* at 49.

[65] Brief of Appellees Conn. Gen. at 46. Similar suggestions by the Penn Central Trustees are answered in detail in Brief of Appellee USRA at 23-24.

[66] As pointed out by the Special Court, there is some evidence that the liquidation value of Penn Central's properties (excluding the "Park Avenue" properties in New York City) may approximate $3.5 billion, of which over $2.6 billion represents land values not subject to deterioration in value through continued use. *Special Court 180-Day Appeals* at 53-54.

[67] Brief of Appellees Conn. Gen. at 46.

injury have established that continued reorganization proceedings will in fact cause them any harm.

Even if the value of the estate as a whole were declining now, that decline might be more than offset by the results of successful reorganization under the Act. Moreover, whether any class of claimants would fare better in, for example, a liquidation beginning now [68] than in a reorganization under the Act depends on the status of that class vis-a-vis other claimants and vis-a-vis the benefits provided by the Act. Plaintiffs assert that, since they include both secured and unsecured creditors and the shareholder of Penn Central, any decline in the value of the estate must be injuring at least one of them.[69] That argument ignores the fact that reorganization under the Act affords a prospect that substantial going-concern values may be produced and that other benefits may be conferred on the estate that will benefit the various claimants in different ways. For example, assuming that the shareholder's interest presently has some value, the $250 million in labor payments authorized by the Act may benefit it by relieving the estate of labor claims which would otherwise be incurred on abandonment and would prime the shareholder's claims.[70]

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[68] As the Special Court noted, immediate liquidation is not really a possibility because, absent the Rail Act, ICC abandonment authority would have to be obtained before liquidation could begin. The Special Court concluded that obtaining such authority would probably take longer than the period prescribed in the Rail Act for implementation of the Final System Plan. *Special Court 180-Day Appeals* at 41-49.

[69] Brief of Appellee New Haven Trustee at 85; Brief of Appellees Conn. Gen. at 34.

[70] The Special Court correctly recognized that such benefits may be taken into account in determining whether the consideration which claimants receive for their properties meets the constitutional minimum. *Special Court 180-Day Appeals at* 105.

C. It Has Not Been Shown That Erosion Will Exceed Constitutional Limits

Plaintiffs concede that, where there exists a reasonable prospect of reorganization, some economic burden may be imposed on claimants while the reorganization is accomplished.[71] As demonstrated in our Brief as Appellant,[72] the limit of uncompensated erosion can be determined only by balancing the economic injury to claimants from continued operations,[73] the harm to the public that would result if service were terminated, and the feasibility of possible solutions. The *New Haven* litigation demonstrates that such balancing can be done. But the record in this case contains nothing to suggest that any injury to claimants will be sufficient to outweigh the public interest in finding a way to continue Northeast rail operations under private ownership. Plaintiffs have produced no legal or factual basis for requiring reorganization efforts to be abandoned now.

The New Haven Trustee seeks to distinguish this Court's prior decisions permitting the imposition of substantial economic burdens on railroad estates pending reorganization. He suggests that *Denver & Rio Grande*[74] was a case in which there was "no erosion" because the book value of the road's assets increased during reorgani-

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[71] Brief of Appellees Conn. Gen. at 51-52; Brief of Appellee New Haven Trustee at 95-96; *cf.* Brief for Appellee Penn Central Co. at 24-29.

[72] Brief of Appellant United States Railway Association in No. 74-167, at 82-97.

[73] As the Special Court succinctly pointed out, economic injury from continued operations must "be viewed in a practical frame, namely, by comparing the prospects afforded by § 304(f) with those that would have prevailed in its absence." *Special Court 180-Day Appeals* at 47.

[74] *Reconstruction Finance Corp.* v. *Denver & Rio Grande W.R.R.*, 328 U.S. 495 (1946).

nsferee railroads. Rather than prolonging which Penn Central will be exposed to ero- il Act may well offer the fastest way to end re.

opening brief we argued that, even if the Rail ed a Tucker Act remedy, Plaintiffs were not en- an injunction because they failed to establish Rail Act would cause erosion beyond constitu- imits. We adhere to that position, but we agree United States that the Court should reach and the Tucker Act issue.

ally, the first defense to these actions for declara- d injunctive relief is that, even on their own es about the facts, Plaintiffs have an adequate at law under the Tucker Act. That issue is re squarely before the Court, and we believe the hould decide it. Only by so doing will this ques- Court of Claims jurisdiction be definitively re- ow in a way that will beyond doubt be binding ture Court of Claims proceeding.

peculiar circumstances of these cases, including rrelationship between these cases and the Special decision on the 180-day appeals, also make it ap- te for this Court now to decide this central issue. gress, USRA, the Special Court, the bankruptcy nd the trustees of the rail estates to discharge onsibilities in resolving the Northeast rail s a matter of fairness to all interests con- finitive answer to this question is plainly

CONCLUSION

The judgment of the court below should be reversed, except as to paragraphs 3 and 4c, with directions to enter an order granting Defendants' motion for summary judgment.

Respectfully submitted,

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